UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

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Joseph H. Maroon, Director
Virginia Department of Conservation and Recreation
203 Governor Street
Richmond, Virginia

Dear Mr. Maroon:

The United States Environmental Protection Agency, Region III (EPA) appreciates the opportunity to review and comment on the proposed Virginia Stormwater Management Regulations. These regulations, in particular Part II A (Stormwater Management Program Technical Criteria), and Part II B (Stormwater Management Program Technical Criteria: Grandfathered Projects), represent some core post-development technical requirements for inclusion in permits for post-development stormwater protection. As a result, EPA's review has focused on the water quality provisions of Part II.

The proposed stormwater regulations establish two paths for permittees-- one for "grandfathered" projects, and one for new projects. Part II A, the new project procedure, utilizes a system where new development cannot exceed .28 lbs/yr/acre output of phosphorous (P) for watersheds that drain to the Chesapeake Bay, and cannot exceed a phosphorous output of .45 lbs/yr/acre for new projects in other watersheds. Under this construct, redeveloped land would require a 20% reduction of phosphorous output below a pre-project calculated load for sites one acre or greater, and a 10% reduction for sites less than one acre. Part II B (Grandfathered Projects), prescribes required best management practices (BMPs) with targeted phosphorous removal efficiencies dependent upon the percent of impervious cover present on the site.

Both paths are based on estimated phosphorous outputs in relation to land uses and percent impervious cover. The Virginia Chesapeake Bay Tributary Strategies formed the basis of the calculations of total phosphorous load reduction necessary to control the far field nutrient loads produced. From that baseline, the stormwater phosphorus load reductions necessary to adhere to Bay loadings were formulated.

EPA has previously commented, and continues to aver, that the proposed Stormwater Management Technical Criteria (currently Part II A) must be generally protective of water quality, particularly in the Chesapeake Bay watershed.When the proposed Stormwater Management Technical Criteria are implemented in permits following the effective date of these regulations, the Fact Sheets for those permits would need to contain evidence that .28 lbs/yr/acre of P is an appropriate surrogate for meeting nitrogen and sediment requirements. For example, there should be a modeling or empirical demonstration that a permittee that meets the P design

standard can achieve nitrogen and sediment limits. Further, if wasteload allocations will require evidence that permits do not exceed TMDLs, more evidence that new development does not exceed any parameter of the WLA would be helpful.

In addition, EPA remains concerned about the impact on local receiving streams based on the procedures outline in the revised section 4VAC50-60-65, Water Quality Compliance, which states: "A. Compliance with water quality design criteria set out in subdivisons 1 and 2 of 4VAC50-6-63 shall be determined by utilizing the Virginia Runoff Reduction Method or another methodology that is demonstrated by the local program to achieve equivalent or more stringent results and is approved by the board." It is unclear what mechanism local programs would employ to determine that the methods they propose are equivalent or more stringent than the Virginia Reduction Runoff Method.

Several other sections in the regulation allow for relaxation of standards or offsite compliance options, including: (1) 4VAC50-60-69, which prescribes payment for phosphorus reduction that cannot be engineered on site; (2) the formulation of comprehensive watershed stormwater management plans, 4VAC50-60-92, which allows local program regulatory revisions; and (3) qualifying local program exceptions, 4VAC50-60-122, which presents an exception process void of water quality considerations, and (4) VAC50-60-63 1.b. describes a procedure where local qualifying programs can relax standards within Urban Development Areas (UDA) in the Chesapeake Bay watershed in which the designations of UDAs is not geographically limited or constrained by water quality concerns. The combined use of these regulatory provisions will make it difficult to adhere to far field load considerations which are the basis of the overall regulation or to protect local water quality.

Moreover, EPA is concerned about the potential for violation of local water quality standards from application of the water quality design criteria alone, or when payments are made, local program revisions are granted, or local exceptions are approved, including the use of UDAs. Streams that are impaired may require more stringent application of BMPs than are required in the Reduction Runoff Method. Trades or offset payments may need to be conducted in the appropriate scale HUCs or impaired segments to assure the desired water quality management result or to protect local water quality standards. Also, the grandfathering clause raises a number of concerns: (1) the Department must demonstrate (*e.g.*, through the Fact Sheet) that the projects that receive coverage under the grandfathered permit are consistent with the federal regulations; (2) the Department should ensure that the grandfathering program does not delay the application of the new standards; and (3) the grandfathering that extends to 2019 is unreasonably long, given the length of average construction projects.

Finally, EPA wishes to present the following specific comments:

4VAC50-60-63 1(b) Water Quality Criteria Requirements. EPA supports the goals of Urban Development Areas. Nonetheless, EPA is concerned that by allowing Local Qualifying Programs to establish relaxed phosphorus limits in the Bay Watershed, it will preclude the attainment of water quality goals. EPA believes that it is critical that the Local Qualifying Program demonstrate to the Board that the proposed limit is consistent with local and tributary water quality requirements when considering the jurisdiction as a

whole. Any relaxation in Urban Areas must be compensated with either more stringent limits in other areas of the Local Qualifying Program or through the use of offsite controls or allowances.

4VAC50-60-69 - Offsite compliance options. Where a Permittee can demonstrate that BMP utilization to meet design loads is not feasible, EPA supports the use of off-site controls to meet post-development pollutant loads, provided that the use of off-site controls does not lead to the impairment of local water quality. However, credits for offsite controls can only be generated after the installation of required baseline BMPs necessary to meet water quality objectives.

4VAC50-60-48 - Grandfathering. Projects that are currently operating under existing approved permits can be grandfathered, so long as the Department can demonstrate that such projects continue to comply with federal requirements. Upon reissuance, more protective water quality requirements will have to be incorporated and the permittee will be required to meet them. The Department's currently proposed grandfathering clause has significantly expanded the grandfathering universe, so that it must ensure that it is consistent with federal regulatory requirements.

4VAC50-60-122 - Qualifying Local Program ("QLP") Exceptions. There is a need for greater specificity as to when an exception is appropriate, to ensure that the Permit satisfies the requirements of 40 C.F.R. § 122.44(s), both as to small construction activity (122.44(s)(1)), and other construction activity (122.44(s)(2)). While Permittees may be able to find the relief sought through the use of offsite controls, these regulations should establish a more detailed standard so that the QLP can be evaluated with regard to the appropriate use of exceptions and in reference to 40 C.F.R. §122.44(s).

4VAC50-60-63 2(c). This section requires that the total phosphorus load cannot be required to be reduced to below the applicable standard for new development unless a more stringent standard has been established by a QLP. In the Definition section of the regulation, "Predevelopment" is defined by reference to "conditions that exist at the time that plans for the land development of a tract of land are submitted to the plan approval authority." Accordingly, the proposed Virginia regulations would require an applicant to reduce total phosphorus loads *at least 20%* from predevelopment. In order to meet or maintain water quality standards, it may be necessary to implement a stricter redevelopment standard. In cases where P levels of "existing conditions" are extremely high, the proposed regulations do not require a proportionate level of reduction to meet some reasonable standard. The draft regulations proposed "at least 20%". The Department should specify criteria for exceeding the 20% reduction.

For example, if a tract of land (e.g., a commercial facility) has a total load of .80 lbs/acre/yr of phosphorus, based on the proposed redevelopment standard the applicant *could* be required to reduce P levels to as little as .16 to .64 lbs/acre/yr (20% of .80 = .16). This would not be protective of water quality standards. Redevelopment projects should be more closely tied to water quality standards and any potential wasteload allocation. Neither UDA areas nor non-UDA areas require a water quality justification of redevelopment projects. UDAs must be employed in a manner consistent with overall water quality goals.

EPA encourages Virginia to address our comments, and then to finalize these regulations in an expeditious manner. In the event that these regulations are not modified to strengthen the underlying water quality requirements the Commonwealth may be required to develop and issue site-specific (individual) permits that would be subject to EPA review and approval.

If you have any questions regarding these comments, please do not hesitate to call Mr. Mark Smith, of the NPDES Permits Branch, at 215-814-3105.

Sincerely,

for Jon Capacasa, Director
Water Protection Division